

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UPMC AND ITS SUBSIDIARY, UPMC
PRESBYTERIAN SHADYSIDE, SINGLE EMPLOYER,
d/b/a UPMC PRESBYTERIAN HOSPITAL AND
d/b/a UPMC SHADYSIDE HOSPITAL

and

SEIU HEALTHCARE PENNSYLVANIA CTW, CLC

Julie Stern Esq.,
for the General Counsel.
Thomas Smock, Esq.,
for the Respondent UPMC.
Betty Grdina, Esq.,
for the Charging Party.¹

Cases 06-CA-102465
06-CA-102494
06-CA-102516
06-CA-102518
06-CA-102525
06-CA-102534
06-CA-102540
06-CA-102542
06-CA-102544
06-CA-102555
06-CA-102559
06-CA-104090
06-CA-104104
06-CA-106636
06-CA-107127
06-CA-107431
06-CA-107532
06-CA-107896
06-CA-108547
06-CA-111578
06-CA-115826

SUPPLEMENTAL DECISION

MARK CARISSIMI, Administrative Law Judge. On January 9, 2014, pursuant to charges filed by SEIU Health care Pennsylvania, CTW, CLC (the Union) the General Counsel issued, a second order further consolidating cases and amended consolidated complaint (the complaint) alleging that Respondent UPMC (UPMC) and Respondent UPMC Presbyterian

¹ While the briefs filed by the Respondent and the Charging Party Union regarding Respondent UPMC's motion seeking dismissal of the complaint allegations alleging that it is a single employer with Respondent Presbyterian Shadyside list the names of several attorneys, I have listed only the attorneys who signed the briefs.

Shadyside (Presbyterian Shadyside) constitute a single employer and that Presbyterian Shadyside committed various violations of Section 8 (a)(4), (3), (2), and (1) of the Act. Thereafter, both Respondents filed with the Board a motion to dismiss the complaint allegation that UPMC and Presbyterian Shadyside constitute a single employer. On February 7, 2014, the Board issued an order denying the Respondents' motion. Thereafter, on February 12, 2014, I opened a hearing that was conducted for 19 days during February, March and April 2014. I issued an order on the record on April 3, 2014, severing the single employer allegations from the merits of the complaint. I determined it was appropriate under the circumstances to first issue a decision regarding the alleged unfair labor practices committed by Presbyterian Shadyside and later issue a supplemental decision regarding the issue of whether UPMC and Presbyterian Shadyside constitute a single employer. My reason for bifurcating the proceeding was that I did not want ongoing subpoena enforcement proceedings regarding the single employer issue to delay my resolution of the substantive unfair labor practice issues in the complaint.² On November 14, 2014, I issued a decision in this case (JD-62-14) in which I found that Presbyterian Shadyside committed various unfair labor practices. That case is presently pending before the Board pursuant to exceptions filed by all parties.

On June 4, 2015, UPMC filed with me a "Partial Motion to Dismiss" the complaint allegations that it constitutes a single employer with Presbyterian Shadyside and that it be dismissed as a party³. The General Counsel and the Union filed oppositions to the partial motion to dismiss filed by UPMC. Thereafter, with my permission, UPMC filed a reply to the oppositions filed by the General Counsel and the Union, and the General Counsel filed a response to the reply filed by UPMC. The briefs contained various attachments which the parties rely on in support of their respective positions. Since I find the briefs and the attachments to constitute a sufficient basis to issue a supplemental decision in this matter without further hearing, I order that the record be reopened for the limited purpose of receiving the briefs and attachments filed by the parties.

In its brief in support of its motion, UPMC requests that it be dismissed as a party in this matter and "that the severed single employer allegations of this matter also be resolved on the basis that Respondent UPMC shall guarantee the performance by Presbyterian Shadyside of any remedial aspects of the Decision and Order which survive the exceptions and appeal process." (UPMC brief at 5.) In UPMC's reply brief it repeats this offer by stating "UPMC has indicated that it guarantees the performance by Presbyterian Shadyside of any remedial aspects of the

² On February 24, 2014, I denied, in substantial part, petitions to revoke the subpoenas duces tecum that the General Counsel had served on UPMC and Presbyterian Shadyside, respectively, and a subpoena duces tecum that the Union had served on UPMC. Consequently, I ordered both the Respondents to produce documents pursuant to the subpoenas. Thereafter, the Respondents indicated they would not comply with my order. On March 24, 2014, on behalf of the Board, the General Counsel filed an application to enforce all three subpoenas in United States District Court for the Western District of Pennsylvania. On August 22, 2014, the district court issued an order granting the Board's application for enforcement of all three subpoenas, which it amended on September 2, 2014. The district court stayed its order pending an appeal by the Respondents. Thereafter, the Respondents appealed the district court's order to the Third Circuit Court of Appeals, where the matter is presently pending.

³ Since the record has opened in this case and the single employer issue remains pending before me, I have jurisdiction to rule on the partial motion to dismiss. Sections 102.35(a)(8) and 102.24(a) of the Board's Rules and Regulations.

Administrative Law Judge's Decision and Order which survive the exceptions and appeal process. As such, UPMC would be responsible for any remedy along with Presbyterian Shadyside." (UPMC reply at 2.) In its motion, however, UPMC does not stipulate that it is a single employer with Presbyterian Shadyside.

In opposing UPMC's motion to dismiss the single employer allegations of the complaint, the General Counsel contends, inter alia, that because the evidence regarding the single employer issue has not been presented, there is no factual basis to evaluate the appropriateness of UPMC's guarantee that it will ensure that Presbyterian Shadyside complies with any order ultimately issued by the Board. The General Counsel also asserts that UPMC's offer to guarantee compliance with any remedial order that may ultimately be issued in this case is ineffective because it is made in the context of seeking to be dismissed as a party from this proceeding. The General Counsel further contends that a finding that UPMC and Presbyterian Shadyside constitute a single employer and are thus jointly and severally liable for the unfair labor practices committed is necessary in order to properly effectuate the policies of the Act.

The Union argues, inter alia, that there is an insufficient basis to accept UPMC's offer to guarantee compliance with the remedy for violations that the Board finds that Presbyterian Shadyside committed. The Union contends, in this regard, that no guarantee has been attached to UPMC's motion.⁴ The Union further argues that dismissing the single employer allegation would be contrary to the law of case as, prior to the opening of the hearing, the Board issued an order denying a motion filed by UPMC in which it sought dismissal of the amendments to the complaint alleging it to be a single employer with Presbyterian Shadyside. The Union further argues that a finding that UPMC and Presbyterian Shadyside constitute a single employer is necessary to achieve complete remedial relief in this matter.

Attached to the Union's opposition is a stipulation that the General Counsel, the Union, and Respondents UPMC, UPMC Presbyterian Shadyside and Magee-Women's Hospital of UPMC entered into in Case 06-CA-081896⁵ (Union Exh. A) that sets forth basic information regarding the relationship between UPMC and Presbyterian Shadyside. According to the parties' stipulation, UPMC is a holding company that owns various subsidiaries which operate 20 hospitals in Pennsylvania, with the majority of them located in the Pittsburgh, Pennsylvania area. UPMC, through its various subsidiaries, also operates over 400 clinical locations in Western Pennsylvania. UPMC, through its various subsidiaries, has over 55,000 employees. Presbyterian Shadyside is a subsidiary of UPMC and employs more than 9,500 employees.

Having duly considered the positions of the parties I have determined that it would not effectuate the policies of to further litigate the issue and make a determination regarding whether UPMC and Presbyterian Shadyside constitute a single employer. I construe UPMC's willingness

⁴ The offer made in UPMC's motion is, of course, binding on it. The Board has long held that statements made by counsel in the management of litigation are binding upon a party. *Performance Friction Corp.*, 335 NLRB 1117, 1149 (2001); *Florida Steel Corp.*, 235 NLRB 1010, 1011-1012 (1978). Accordingly, I find no merit in the Union's contention regarding this issue.

⁵ Part of this case was settled and the remaining part was litigated before an administrative law judge. A decision issued on April 19, 2013 (JD-28-13), which is presently pending before the Board on exceptions.

to serve as the guarantor of any remedy that ultimately may be issued by the Board in this case as consent that it undertake such action pursuant to a Board order. Accordingly, I have concluded that it is appropriate to dismiss the allegations in the complaint that UPMC and Presbyterian Shadyside constitute a single employer but, based on its asserted willingness to do so, order
 5 UPMC to ensure that Presbyterian Shadyside complies with any remedy that may be ordered by the Board in this case. I believe that this approach eliminates what I now believe to be unnecessary litigation over the single employer issue and addresses the concern of the General Counsel and the Union regarding the manner in which UPMC's guarantee will be enforced.

10 The Board has long recognized that under certain circumstances it does not effectuate the policies of the Act to find that a violation of the Act has occurred and issue a remedial order. *Bellinger Shipyards*, 227 NLRB 620 (1976); *Wichita Eagle & Beacon Publishing Co.*, 206 NLRB 55 (1973); *Square D Co.* 204 NLRB 154 (1973); *American Federation of Musicians, Local 76 (Jimmy Wakely Show)*, 202 NLRB 620 (1973); *Kentile Inc.*, 145 NLRB 135 (1963);
 15 *Fabrica De Muebles Puerto Rico*, 107 NLRB 905 (1954). Although the circumstances in those cases differ from the instant one in that none of them involved a single employer allegation, the similarity is that the allegedly unlawful conduct that occurred in those cases had been substantially remedied by later conduct.

20 In the instant case, as noted above, UPMC is now proposing that the single employer allegation in the complaint be resolved on the basis that it guarantees compliance with any remedies the Board may issue regarding any unfair labor practices committed by Presbyterian Shadyside in the original decision in this case that is presently pending before the Board. It is important to note that the complaint does not allege that UPMC independently committed any of
 25 the unfair labor practices alleged in the complaint. In addition, there was no evidence presented at the trial that UPMC independently committed any unfair labor practices. Thus, any liability that UPCM would have for any of the unfair labor practices committed by Presbyterian Shadyside would be solely dependent upon a finding that it constitutes a single employer with Presbyterian Shadyside.

30 In my view, accepting UPMC's offer to serve as a guarantor and ensure that Presbyterian Shadyside complies with any remedies provided for in a Board order is an appropriate way to resolve the single employer allegation. In accepting this offer, I will dismiss the allegation in the complaint that UPMC and Presbyterian Shadyside constitute a single employer, but I will retain
 35 UPMC as a party to the case in order to ensure that there is a mechanism to enforce, if necessary, its willingness to serve as a guarantor for any remedies ordered by the Board.

To agree with the oppositions filed by the General Counsel and the Union, would result in the dismissal of the Respondent's motion and the continued litigation of the issue of whether
 40 UPMC and Presbyterian Shadyside constitute a single employer. At present, the single employer allegation in the complaint is being held in abeyance because a subpoena enforcement proceeding involving documents relevant to this question is pending in the Third Circuit. If the General Counsel prevails in all or part of the subpoena enforcement proceeding, UPMC and Presbyterian Shadyside would be required to produce relevant documents for inspection by the
 45 General Counsel and the Union. After that review, the

General Counsel would file a motion with me seeking to resume the hearing on the single employer allegation.⁶ After scheduling hearing dates, the litigation of the single employer issue would resume. Based on my knowledge of this case I estimate that such a hearing would last 4 to 5 days. After the filing of briefs I would, of course, issue a decision regarding the merits of the allegation that UPMC and Presbyterian Shadyside constitute a single employer. If I should find that UPMC and Presbyterian Shadyside, in fact, constitute a single employer, I would further find, consistent with Board law, that they are jointly and severally liable for the violations of the Act found in the underlying unfair labor practice case. *Naperville Jeep/Dodge*, 357 NLRB No. 183 slip op. at 2 fn. 5 (2012); *Emsing's Supermarket, Inc.* 284 NLRB 302 (1987). If I should conclude that UPMC and Presbyterian Shadyside do not constitute a single employer I would dismiss the single employer allegation from the complaint and consequently UPMC would no longer be a party to the case. Of course, any decision that I would issue would be subject to appeal to the Board thus engendering further litigation of the single employer issue.

Accepting UPMC's offer to serve as a guarantor of any remedy that the Board may ultimately order against Presbyterian Shadyside and providing that UPMC do so pursuant to an order, in my view, is as effective a remedy as I would provide if I were to find UPMC and Presbyterian Shadyside to be a single employer and thus jointly and severally liable for the unfair labor practices I have found were committed by Presbyterian Shadyside. The great benefit to this approach is that this additional safeguard to ensure that employees ultimately achieve a full remedy in this case is obtained without the time-consuming and expensive course of litigating the single employer issue to its conclusion. This benefit is also obtained without the risk that further litigation of the single employer issue may result in a finding that UPMC and Presbyterian Shadyside are not, in fact, a single employer. If such a conclusion were to be reached, UPMC would have no liability for the unfair labor practices committed by Presbyterian Shadyside.

As indicated above, the approach I have outlined above addresses the concerns of the General Counsel and the Union regarding the manner in which UPMC's guarantee that Presbyterian Shadyside will comply with any final Board order will be enforced, if necessary. I do not find persuasive any of the other reasons advanced by the General Counsel and the Union as to why I should not accept UPMC's offer to guarantee compliance with any remedy ordered and resolve the single employer allegations on that basis.

As noted above, the Union claims that the Board's February 7, 2014, Order denying UPMC's motion to dismiss it as a Respondent is the established law of the case and compels the denial of UPMC's instant partial motion to dismiss. In its motion filed with the Board before the commencement of the hearing in this case, UPMC asserted, inter alia, that with respect to the amended consolidated complaint which issued on January 9, 2014, alleging that UPMC and UPMC Presbyterian Shadyside constitute a single employer, there were no substantive

⁶ It is, of course, possible that the circuit court will not affirm the district court's order requiring the Respondent to produce documents pursuant to the subpoenas. Since the General Counsel issued a complaint alleging that UPMC and Presbyterian Shadyside constitute a single employer without the subpoenaed documents, I presume that, even in this scenario, the General Counsel would wish to continue to litigate the single employer issue.

allegations involving UPMC, there was no complaint allegation alleging that UPMC Presbyterian Shadyside could not fully remedy any violation found, and that litigating the single employer issue would take time and expense, and waste the resources of all parties without furthering the purposes of the Act. The Board's order indicated "The Respondents' Motion to Dismiss Amendments to the consolidated complaint is denied. The Respondents have failed to establish that the amendments are improper and that they are entitled to judgment as a matter of law." Clearly, the instant motion presents changed circumstances from those that UPMC relied on in filing its motion to dismiss with the Board. In the instant motion, UPMC seeks to dismiss the single employer allegation in the complaint on the basis that it is willing to serve as a guarantor and ensure that any remedy that the Board orders with respect to unfair labor practices committed by Presbyterian Shadyside are complied with. In filing its motion with the Board, UPMC did not make such an argument and accordingly the Board did not to consider it. In *Teamsters Local 75 (Schreiber Foods)* 349 NLRB 77 (2007) , a case relied on by the Union in support of its position, the Board specifically indicated that changed circumstances may warrant departing from an initial order. *Id.* at 80. Accordingly, because of these changed circumstances that have occurred since the time of the Board's order of February 7, 2014, I do not find that order requires dismissal of the instant motion.

I further disagree with the Union's contention that in the present posture of this case the General Counsel possesses unreviewable discretion regarding the disposition of the single allegation in the complaint. In support of its position, the Union relies on *Sheet Metal Workers, Local 28 (American Elgen)*, 306 NLRB 981 (1992). This case is factually inapposite because it involves the General Counsel's discretion to *withdraw* (emphasis supplied) a complaint after a hearing has opened but before any evidence has been introduced, when there is "no contention that a legal issue is ripe for adjudication on the parties' pleadings alone." *Id.* at 981. The instant case, of course, involves whether it is appropriate to *dismiss* (emphasis supplied) the single employer allegation of the complaint at this juncture based on a conclusion that further litigation of that issue would not effectuate the policies of the Act. In that context, I find that the Board's decision in *Sheet Metal Workers, Local 28*, *supra*, does offer some guidance on this issue. There, the Board indicated:

At some point, however, a complaint may be said to have advanced so far into the adjudicatory process that a dismissal takes on the character of adjudication, and at that point the General Counsel no longer possesses unreviewable discretion in the matter. Thus, the Board has held that "where . . . relevant evidence has been adduced at a hearing, the General Counsel no longer retains absolute control over the complaint; and a subsequent motion to dismiss the complaint or any portion thereof is within the [administrative law judge's] discretionary authority." *Id.* at 982. (citations omitted)

The adjudication of the complaint in this case has progressed to the point that 19 days of hearing have been held and I have issued a decision on the substantive unfair labor practice allegations of the complaint. While not all of the evidence regarding the single employer allegation has been introduced, I find that the litigation has progressed to the point that UPMC's motion to resolve the single employer allegation on the basis of its offer to guarantee the remedy is appropriately within my authority to decide.

I find *Cincinnati Enquirer*, 298 NLRB 275 (1990), another case relied on by the Union, to be distinguishable from the instant matter. In that case, in a preliminary ruling, the administrative law judge concluded that a regional director was “without authority” to issue a complaint alleging a particular violation of Section 8(a)(5). The Board indicated the judge’s statement was erroneous because the contents and issuance of a complaint are matters solely within the prosecutorial authority of the General Counsel. In the instant case, I recognize the General Counsel’s unreviewable discretion to issue the single employer allegation of the complaint. I find, however, for the reasons that I set forth herein, that it does not effectuate the policies of the Act to continue the litigation on this issue, given UPMC’s offer to guarantee compliance with any remedy ordered by the Board in this case, and therefore I shall dismiss that allegation of the complaint.

I also do not agree with the Union’s argument that the Board’s decision in *Three Sisters Sportswear*, 312 NLRB 853 (1993) supports the necessity of proceeding with the trial of the single employer allegations in order to achieve an appropriate remedy in this case.

Three Sisters involved a long and complex history of litigation. In summary, in a prior case, *Southland Knitwear, Inc.*, 260 NLRB 642 (1982), the Board found that Southland and Metropolitan, as a single integrated enterprise, committed violations of Section 8(a)(3),(2) and (1) including the discriminatory layoff of 83 employees. After the Board’s decision, Southland and Metropolitan purportedly closed its operations in mid-September, 1983. Thereafter, the General Counsel received information that those entities were still operating, but under the following names: Three Sisters Sportswear Co.; Three Sisters Apparel Corp.; Bedford Cutting Mills Co.; Metropolitan Sweater Industries, Inc.; United Knitwear Industries, Inc.; United Knitwear Industries, Ltd.; and Skylight Fashions, Inc. d/b/a Skylight Trading. Consequently, in June 1989, the General Counsel issued a backpay specification claiming that all of the above-named corporations were a single employer and alter ego with Southland and Metropolitan and that all of those corporations were jointly and severally liable for back pay owed under the Board’s order in *Southland Knitwear Inc.* In addition, in June 1991, the General Counsel issued a new complaint against the above-named corporations and 144 Spencer Realty Corp., (Spencer), alleging that all of these corporations were a single employer and had committed additional various violations of Section 8(a)(4), (3) and (1).

In March 1992, the parties entered into a stipulation in the compliance case providing that all of the named respondents named in the backpay specification and Spencer were jointly and severally liable for the full amount of the backpay owned by Southland and Metropolitan pursuant to the Board’s order in *Southland Knitwear Inc.* The stipulation did not contain an admission that the corporations were a single employer or alter egos to each other or to Southland or Metropolitan.

In the unfair labor practice proceeding on the new complaint in *Three Sisters Sportswear*, the administrative law judge rejected a contention made by the respondents that the single employer issue should also not be decided during the unfair labor practice proceeding but should be deferred, if necessary, to a compliance proceeding in that case. In so finding, the judge noted that the relationship between the companies had already been extensively litigated at the hearing and that postponing a decision on the issue would require duplication of such litigation in the event that the respondents did not comply with the decision in the unfair labor practice

proceeding. In addition, the judge decided that the connection between the named respondents and Southland and Metropolitan must be decided in order to determine the propriety of special remedies requested by the union. 312 NLRB at 857. In reaching this conclusion, the judge noted that the owners of Southland and Metropolitan carried out their unlawful threat to close the facility, but then reopened again under the new corporate names set forth above in order to avoid their responsibilities under the Act. Id. at 862.

I find the circumstances in *Three Sisters* to be quite different from those that exist in the instant case and thus find it to be distinguishable. In the first instance, in *Three Sisters*, the evidence regarding the complicated relationship between the various companies had already been presented at the unfair labor practice hearing. In addition, *Three Sisters* involved a situation where the owners of a relatively small facility with approximately 150 employees engaged in egregious violations of the Act and then attempted to evade their obligations to remedy that conduct by purportedly closing the facility and then reopening and operating it under a variety of corporate names. Thus, the case involved a history presenting the possibility of remedial failure.

In the instant case, the evidence regarding whether UPMC and Presbyterian Shadyside constitute a single employer has yet to be fully presented and accepting the proposal of UPMC avoids such expensive and time-consuming litigation. Both Presbyterian Shadyside and UPMC are substantial entities. Presbyterian Shadyside employs approximately 9,500 employees and UPMC, through its subsidiaries, has approximately 55,000 employees. There is no evidence to suggest that there is a real possibility that Presbyterian Shadyside would be unable to effectuate any remedies ordered by the Board. Despite that, in order to avoid litigation of the single employer issue, UPMC is willing to guarantee that its subsidiary, Presbyterian Shadyside, will comply with any remedies ordered by the Board. Accordingly, I do not find that the Board's decision in *Three Sisters* supports the necessity of proceeding to further litigate the single employer issue in this case.

On the basis of the foregoing, I have concluded that it is appropriate to accept the proposal of UPMC that it be the guarantor of any remedy that the Board may order in the original decision in this case (JD-62-14) and I will issue an order requiring it to do so. On that basis, I have determined that it would not effectuate the policies of the Act to continue to litigate the complaint allegation that UPMC and Presbyterian Shadyside constitute a single employer and I therefore dismiss that allegation in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, UPMC, its officers, agents, successors, and assigns, shall be the guarantor of any remedies that the Board may order in the original decision in this case (JD-62-

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

14). As the guarantor, Respondent UPMC must ensure that Respondent UPMC Presbyterian Shadyside takes all steps necessary to comply with any remedies that may be contained in the Board's Order, including providing for any such remedies itself, if UPMC Presbyterian Shadyside is unable to do so.

IT IS FURTHER ORDERED that the allegation in the complaint that Respondent UPMC and Respondent UPMC Presbyterian Shadyside constitute a single employer is dismissed as, under the circumstances, it would not effectuate the policies of the Act to continue to litigate and reach a decision regarding that allegation.

Dated, Washington, D.C., July 31, 2015.



Mark Carissimi
Administrative Law Judge